

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 PEOPLES BANK,

10 Plaintiff,

11 v.

12 BLUEWATER CRUISING LLC, *et al.*,

13 Defendants.
14

Case No. C12-00939RSL

ORDER REGARDING CROSS-
MOTIONS FOR SUMMARY
JUDGMENT

15
16 **I. INTRODUCTION**

17 This matter comes before the Court on “Defendants’ Motion for Partial Summary
18 Judgment” (Dkt. # 27), “Defendants’ Second Motion for Partial Summary Judgment Dismissing
19 Plaintiff’s Complaint” (Dkt. # 61), “Defendants’ Supplemental Motion for Partial Summary
20 Judgment Re: Conversion” (Dkt. # 65), and “Peoples Bank’s Motion for Partial Summary
21 Judgment” (Dkt. # 73). Defendants seek summary judgment on Plaintiff’s deficiency claim, and
22 their counterclaims of conversion, breach of contract, and unjust enrichment. Plaintiff seeks
23 summary dismissal of all eleven of Defendants’ counterclaims.

24 Having reviewed the memoranda, declarations, and exhibits submitted by the parties and
25 having heard the arguments of counsel, Court finds as follows:¹

26
27 ¹ The Court DENIES Plaintiff’s motion to strike the two marine valuation surveys attached to
28 Ms. Nettleship’s declaration on the grounds that they constitute hearsay and expert opinion testimony
ORDER REGARDING CROSS-MOTIONS
FOR SUMMARY JUDGMENT - 1

II. BACKGROUND FACTS

A. The Loan

On April 14, 2008, Defendant Bluewater Cruising, LLC (“Bluewater”) obtained a loan from Plaintiff Peoples Bank (the “Bank” or “Plaintiff”) in the amount of \$329,300 to purchase a sailing yacht, the S/V Maamalni (the “Vessel”). Dkt. # 27-1 at 9-10. Defendant Susan Nettleship, manager of Bluewater, executed a Promissory Note (“Note”) on Bluewater’s behalf and granted a Preferred Ship Mortgage (the “Mortgage”) to Plaintiff to secure the loan. *Id.* at 9-10, 16-17. To secure the payment of the Note, the Mortgage conveys to Plaintiff “the whole of the Vessel, together with all of the mast, bowsprit, boat, anchors, cables, chains, rigging, tackle, apparel, furniture, and all other necessities thereunto appertaining and belonging.” *Id.* at 16.² In the case of default, the Mortgage authorizes Plaintiff

to take possession of said goods, chattels, and personal property at any time, wherever found, either before or after the expiration of the time aforesaid, and to sell and convey the same, or so much thereof as may be necessary to satisfy the said debt, interest and reasonable expenses, after first giving a notice of a legal number of days, to be given by publication in some newspaper published in the city where [Bluewater] resides or conducts business, and to retain the same out of proceeds of such sale; the surplus (if any) to belong and to be returned to

that was not disclosed pursuant to the deadlines set forth in the Court’s scheduling order. Dkt. # 29 at 20-23. Because these documents could be presented in a form admissible at trial, the Court DENIES Plaintiff’s motion to strike. *Block v. City of L.A.*, 253 F.3d 410, 418-19 (9th Cir. 2001) (At summary judgment stage, “a party does not necessarily have to produce evidence in a form that would be admissible at trial.”); *see also* Fed. R. Civ. P. 56(c)(2). Furthermore, the Court finds that Defendants timely disclosed these reports before the deadline for disclosing rebuttal expert witness opinion, *see* dkt. # 21; Fed. R. Civ. P. 26(a)(2)(D)(ii), and Plaintiff has not moved to strike the expert witnesses.

² The Note also provides that “[a]ll tackle, equipment, motors, accessories, sails (if any) and furnishings now or hereafter belonging to the described boat, include without limitation, auxiliary engines, shore dinghies, ground tackle, all safety equipment, running rigging, mooring lines, and fenders, batteries, spare parts, electronic and navigational aids (including without limitation radar systems, radios, lorans, global positioning systems, depth sounders, speed logs, anemometers, electronic[s], charts and plotters), auto pilots, televisions, stereo systems, generators, inverters, navigational charts, together with all ending and vessel logs, owner/manufacturer manuals for the hull, engine, electrical wiring and plumbing diagrams, sail plans, safety equipment manuals, yard or transportation trailers and the items more particularly described on the inventory (if applicable).” Dkt. # 27-1 at 10.

1 [Bluewater].

2 Id. at 16.

3 In addition to executing the Mortgage, Ms. Nettleship unconditionally guaranteed
4 Bluewater's obligations under the Note pursuant to a Guaranty. Id. at 12-14. Both the Note and
5 the Guaranty provide that they "will be governed by federal law applicable to [Peoples Bank]
6 and, to the extent not preempted by federal law, the laws of the State of Washington without
7 regard to its conflicts of law provisions." Id. at 10, 13.

8 **B. Default, Repossession and Sale of the Vessel**

9 In fall of 2011, while Ms. Nettleship and her husband, Michael Bell, were sailing around
10 the world on the Vessel, Ms. Nettleship, on behalf of Bluewater, fell behind on the loan
11 payments. Dkt. # 27-1 ¶ 8. Ms. Nettleship had previously made late payments, but until August
12 2011, the Bank had regular contact with her regarding these late payments. Dkt. # 31 ¶¶ 8-11.
13 Despite several attempts to reach Ms. Nettleship via e-mail and phone, Plaintiff did not hear
14 from Ms. Nettleship until January 2012, more than four months after she defaulted on the loan.
15 Id. at 17. On January 12, 2012, Ms. Nettleship sent an e-mail to Plaintiff offering to make a
16 single monthly payment on February 1, 2012. Id. In response, Plaintiff informed Ms. Nettleship
17 that her offer was insufficient and she needed to pay the full amount of the default. Id. Ms.
18 Nettleship reassured Plaintiff that she was committed to becoming current on the loan and she
19 informed Plaintiff that she and the Vessel were in Opuia, New Zealand. Id. at 19. During the
20 next several months, Ms. Nettleship and her business partner, Larry Atkinson, continued to
21 reassure Plaintiff that the amount in default would be paid shortly. Id. at 21-22. However, as of
22 late March 2012, Ms. Nettleship had missed five payments. Because she was more than \$19,000
23 behind in payments, Plaintiff decided to foreclose on the Vessel. Id. ¶¶ 22-24.

24 On April 16, 2012, New Zealand authorities executed a warrant of arrest on the Vessel in
25 Auckland, New Zealand. Dkt. # 33-1 at 8-9; see also Dkt. # 27-1 ¶¶ 9-10; Dkt. # 33-1 at 8-9.
26 Plaintiff instituted an action against the Vessel and Ms. Nettleship by serving both parties the
27

1 same day. Dkt. # 33-1 at 11-14, 16-21. The day after the arrest, New Zealand authorities
2 removed Ms. Nettleship and Mr. Bell from the Vessel, and the Vessel remained under New
3 Zealand authorities' control. Dkt. # 27-1 at ¶10; see Dkt. # 33-1 ¶¶ 18-19. That same day, Ms.
4 Nettleship, represented by New Zealand counsel, began negotiating a resolution with Plaintiff,
5 also represented by New Zealand counsel. Dkt. # 33-1 ¶¶ 14-16.

6 On May 18, 2012, Ms. Nettleship's counsel sent an e-mail to Plaintiff's counsel
7 requesting permission for Ms. Nettleship and Mr. Bell to return to the Vessel to retrieve personal
8 items. Dkt. # 33-2 at 10-21. Ms. Nettleship's counsel indicated that Ms. Nettleship did not
9 intend to defend the action, but merely wanted to retrieve some personal property before the
10 expiration of their visas on May 28, 2012. Id. at 10. Plaintiff agreed to the removal of purely
11 personal items from the Vessel, but determined that all other items should remain as part of the
12 Vessel. Id. at 25-26. Plaintiff, however, conditioned this agreement on the execution of a U.S.
13 Bill of Sale ("Bill of Sale"). Id. During subsequent negotiations related to the removal of items
14 from the Vessel, Ms. Nettleship informed Plaintiff that she would agree to sign the Bill of Sale if
15 Plaintiff would agree to certain procedures for determining which items belonged to the Vessel
16 and would allow her and Mr. Bell to retrieve certain items from the Vessel. Id. at 34. On May
17 25, 2012, Ms. Nettleship executed a Bill of Sale on behalf of Bluewater. Dkt. # 31 at 26. After
18 the Bill of Sale was signed, Ms. Nettleship and Mr. Bell returned to the Vessel, gathered a few
19 personal items, and left New Zealand. Dkt. # 27-1 ¶ 14.

20 Shortly after the Bill of Sale was signed, Plaintiff hired an Auckland, New Zealand,
21 broker to market and sell the Vessel in New Zealand. Dkt. # 31 ¶¶ 37-38. Plaintiff did not have
22 any formal appraisals performed before listing the Vessel, but instead relied on the broker's
23 examination and valuation of the Vessel for listing purposes. Dkt. # 62 at 27-28. The broker
24 listed the Vessel for \$269,000 N.Z. (approximately \$163,000 U.S.) and received an offer for the
25 listing price within a week. Dkt. # 30 at 5; see also Dkt. # 31 at 30-36; Dkt. # 62 at 36; Dkt. #
26 79-1 at 15. Plaintiff did not provide notice by publication in a newspaper, as required by the

1 Mortgage. Dkt. # 62 at 67. Ms. Nettleship did not receive notice of the sale until a few days
2 after Plaintiff accepted the offer. Dkt. # 38 ¶ 4; see also Dkt. # 37 at 4. She was not informed of
3 the date, time, or place of sale. Dkt. # 38 ¶ 4.

4 In July 2012, default judgment was entered against the Vessel in the New Zealand action.
5 Dkt. # 62 at 80. Plaintiff dismissed its claims against Ms. Nettleship. Id. Shortly thereafter,
6 Plaintiff executed and recorded a Satisfaction of Mortgage, indicating that the Mortgage had
7 been paid in full and consenting to the discharge of record. Dkt. # 62 at 17.

8 **III. DISCUSSION**

9 Summary judgment is appropriate when, viewing the facts in the light most favorable to
10 the nonmoving party, the record shows that “there is no genuine dispute as to any material fact
11 and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The party
12 seeking summary dismissal of the case “bears the initial responsibility of informing the district
13 court of the basis for its motion,” Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986), and
14 identifying those portions of the materials in the record that show the absence of a genuine issue
15 of fact, Fed. R. Civ. P. 56(c)(1). Once the moving party has satisfied its burden, it is entitled to
16 summary judgment if the non-moving party fails to designate “specific facts showing that there
17 is a genuine issue for trial.” Celotex Corp., 477 U.S. at 324. “The mere existence of a scintilla
18 of evidence in support of the non-moving party’s position is not sufficient.” Triton Energy
19 Corp. v. Square D Co., 68 F.3d 1216, 1221 (9th Cir. 1995). “[S]ummary judgment should be
20 granted where the nonmoving party fails to offer evidence from which a reasonable jury could
21 return a verdict in its favor.” T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n, 809 F.2d
22 626, 631 (9th Cir. 1987).

23 **A. Deficiency Claim**

24 Defendants contend that Plaintiff’s foreclosure of the Vessel constitutes one of the three
25 things: 1) a foreclosure under the Ship Mortgage Act (“SMA”)/Judicial Sales Act (“JSA”), 2) a
26 strict foreclosure under Washington’s Uniform Commercial Code (“UCC”), or 3) a self-help
27

1 repossession under the UCC. Dkt. # 61 at 1-2. Defendants argue that Plaintiff is not entitled to
2 recover a deficiency under any of those theories because Defendants failed to comply with the
3 strict requirements of the SMA and JSA; Defendants accepted the Vessel in full satisfaction of
4 the debt; and Plaintiff failed to comply with the UCC provisions governing the seizure and sale
5 of collateral. The Court addresses each argument in turn.

6 **1. Remedies under the SMA and JSA**

7 Defendants first argue that the SMA requires a mortgagee to follow the procedures
8 outlined in the JSA when foreclosing on a preferred ship mortgage and because Plaintiff failed to
9 comply with these procedures, Plaintiff is precluded from seeking any deficiency. Dkt. # 27 at
10 8-9 (citing 46 U.S.C. § 31325(b)(2)(A)). The relevant provision of the SMA, however, was
11 amended in 1996 to provide non-judicial alternatives for lenders to take possession of a vessel
12 after default. 46 U.S.C. § 31325(b)(3) (“On default of any term of the preferred mortgage, the
13 mortgagee may. . . enforce the preferred mortgage lien or a claim for the outstanding
14 indebtedness secured by the mortgaged vessel, or both by exercising any other remedy
15 (including an extrajudicial remedy) against a documented vessel. . . or a mortgagor. . . for the
16 amount of the outstanding indebtedness or any deficiency in full payment of that indebtedness, if
17 the remedy is allowed under applicable law.”). This amendment made clear that marine lenders
18 were not required to pursue foreclosure in court to preserve their right to recover a deficiency
19 following the sale of the vessel. Barclays Bank PLC v. Poynter, 710 F.3d 16, 20 n.4 (1st Cir.
20 2013).³ Furthermore, the SMA does not prohibit parties to a preferred ship mortgage from
21 agreeing in contract to self-help repossession under state law. Dietrich v. Key Bank, N.A., 72
22 F.3d 1509, 1517 (11th Cir. 1996) (SMA does not preempt state law provisions providing self-
23 help procedures); see also H.R. Rep. No. 104-854, at 137 (“Consistent with existing law, the
24

25 ³ Additionally, as the legislative history makes clear, the amendment “also supports the
26 international recognition of vessel mortgage foreclosures under principles of comity and permits a
27 preferred mortgage on a U.S.-flag vessel to be foreclosed in a foreign court having jurisdiction over the
28 vessel.” H.R. Rep. No. 104-854, at 136-37 (1996) (Conf. Rep.).

1 rights of any maritime lien claimant or holder of a preferred mortgage are expressly preserved
2 under the amendments made by this section, notwithstanding the use of a self-help remedy under
3 state law.”).

4 Because the SMA expressly allows a mortgagee such as Plaintiff to pursue non-judicial
5 self-help remedies following default on a preferred ship mortgage, whether Plaintiff complied
6 with the JSA’s procedural requirements is not dispositive.⁴

7 **2. Full Satisfaction of Debt Under the UCC**

8 Defendants also contend that Plaintiff is not entitled to seek a deficiency because it
9 accepted the Vessel in full satisfaction of the underlying debt pursuant to the UCC. Dkt. # 61 at
10 12. Plaintiff responds that the UCC does not apply because the parties did not contract for it to
11 apply and even if the UCC does apply, Plaintiff did not accept the collateral in full satisfaction of
12 the debt as defined by the UCC. Dkt. # 78 at 7-11.

13 As a preliminary matter, the Court concludes that the UCC applies to the Mortgage.
14 Although the Mortgage itself does not identify the governing law, the attached Note and related
15 Guaranty expressly provide that they “will be governed by federal law applicable to [the Bank]
16 and, to the extent not preempted by federal law, the laws of the State of Washington.” Dkt. #
17 27-1 at 10, 13. Furthermore, the Mortgage incorporates the terms of the Note and the language
18 of the Mortgage clearly anticipates both self-help repossession and private sale of the Vessel. Id.
19 at 16 (“if default be made in such payments. . . the Mortgagee is hereby authorized to take
20 possession of said goods, chattels, and personal property at any time, wherever found. . . and to
21 sell and convey the same”). Beyond arguing that the UCC does not apply and recommending
22

23 ⁴ Defendants argue in reply that Plaintiff’s deficiency claim should be dismissed because it
24 failed to comply with the UCC. Dkt. # 34 at 3-11. The Court would ordinarily strike this argument and
25 the evidence submitted in support because it was raised for the first time after Plaintiff responded to the
26 motion for partial summary judgment, thereby denying Plaintiff an opportunity to respond. However,
27 because this argument was subsequently presented in Defendants’ second motion for partial summary
28 judgment and Plaintiff has had an opportunity to respond, the Court DENIES as moot Plaintiff’s motion
to strike Section B of Defendants’ reply memoranda (Dkt. # 41).

1 that the Court look to the contracts between the parties, Plaintiff fails to identify any alternative
2 law that should govern the self-help remedy at issue in this case. Dkt. # 78 at 7-8. Because the
3 Mortgage incorporates the terms of the Note, which contains a governing law clause providing
4 that federal law and where not preempted, Washington law, govern, and the Mortgage
5 contemplates the use of self-help remedies in the event of default, the Court finds that
6 Washington's UCC applies to the Mortgage. See Dietrich, 72 F.3d at 1512.

7 Having determined that the UCC applies, the Court turns to Defendants' argument that
8 Plaintiff effected a strict foreclosure under the UCC. RCW 62A.9A-620 governs the procedure
9 for accepting collateral in full or partial satisfaction of a debt. According to this section of the
10 UCC, a secured party such as Plaintiff may only accept collateral in full or partial satisfaction of
11 the underlying debt if (1) the debtor consents to the acceptance of collateral in full satisfaction of
12 the obligation in a "record authenticated after default," or by failing to notify the secured party
13 of any objections following receipt of a proposal from the secured party, and (2) the secured
14 party consents to the acceptance "in an authenticated record" or sends a proposal to the debtor.
15 RCW 62A.9A-620(a)-(c). All that is required for strict foreclosure to occur is that the debtor
16 agree to the acceptance of collateral in full satisfaction of the debt in writing after default and the
17 secured party consent to satisfaction in an authenticated record. See RCW 62A.9a-620, UCC
18 cmt. 2, 3, 5.

19 Defendants argue that the requirements for effective acceptance were met in this case.
20 First, they contend that Ms. Nettleship's signature on the Bill of Sale, which states that the
21 "Vessel is sold free and clear of all liens, mortgages, and other encumbrances of any kind and
22 nature," satisfies the requirement that the debtor consent to acceptance following default under
23 RCW 62A.9A-620(c)(2). Dkt. # 61 at 14. Even though the Bill of Sale does not state that the
24 transfer of title satisfies the debt, Ms. Nettleship believed her execution of this document
25 relieved her of any ongoing obligation under the Preferred Mortgage. Dkt. # 64 ¶ 5. Second,
26 Defendants argue that Plaintiff's Satisfaction of Mortgage, signed by Charles Guildner on behalf
27

1 of Plaintiff, after Plaintiff received the Bill of Sale from Ms. Nettleship establishes Plaintiff's
2 consent to the acceptance in an authenticated record. Dkt. # 61 at 14.

3 Although Plaintiff argues that it did not accept the Vessel in satisfaction of the debt, it
4 does not dispute that it recorded a Satisfaction of Mortgage in July 2012. Dkt. # 78 at 8.
5 Notably, the Satisfaction of Mortgage provides that the "Preferred Mortgage has been paid," and
6 it discharges the debt of record. Dkt. # 62 at 17. The Bank, however, contends that it executed
7 and filed the Satisfaction of Mortgage by mistake, and did not intend to accept the Vessel in full
8 satisfaction of the underlying debt, as supported by the fact that the Bank had already filed this
9 case seeking to recover the deficiency. See Dkt. # 90 at 7-8, Dkt. # 78 at 6-7. Because neither
10 the Bill of Sale nor the Satisfaction of Mortgage clearly states that Plaintiff accepted the Vessel
11 in full satisfaction of the debt or that Defendants consented to acceptance, the Court finds that
12 genuine issues of material fact exist regarding whether strict foreclosure under the UCC
13 occurred in this case.⁵

14 **3. UCC Violations**

15 Defendants argue that even if Plaintiff did not accept the Vessel in full satisfaction of the
16 obligation, Plaintiff is precluded from seeking a deficiency judgment because it failed to comply
17 with the mandatory notice provisions of the UCC, dkt. # 61 at 16-18, and the sale of the Vessel
18 was not commercially reasonable, id. at 19-23.⁶ In a deficiency action, if the debtor places the
19 secured party's compliance with the UCC in issue, the secured party has the burden of
20 establishing that the collection, enforcement, disposition, or acceptance was conducted pursuant

21
22 ⁵ Although the Court finds that issue of fact remain for trial, the Court is clearly troubled by the
23 Bank's characterization of its execution and recording of the Satisfaction of Mortgage as a "mistake,"
24 particularly where the Bank chose to execute and record its own Satisfaction of Mortgage, rather than
the form provided by the Coast Guard to release the Mortgage. See Dkt. # 81 at 35.

25 ⁶ Defendants argue in their reply in support of their second motion for summary judgment the
26 Bank violated RCW 62A.9A-609 by conducting a self-help repossession of the Vessel with the
27 assistance of New Zealand government officials. Dkt. # 80 at 8-9. Because this argument was raised for
the first time after Plaintiff responded to the motion, Plaintiff was deprived of its opportunity to respond.
The Court has not, therefore, considered this alternative – and untimely – argument.

1 to the UCC. RCW 62A.9A-626(a)(1)-(2). If the secured party fails to meet this burden, the
2 amount of deficiency is limited to the underlying obligation, expenses, and attorney's fees minus
3 the greater of (1) the proceeds of the disposition of the collateral, or (2) the amount of proceeds
4 that would have been realized had the noncomplying party complied with the pertinent provision
5 of the UCC. Id. 62A.9A-626(a)(3). The latter amount is deemed to be equal to the debt,
6 expenses and attorney's fees unless the secured party proves that it is less than that amount. Id.
7 62A.9A-626(a)(4).

8 **a. Notice Requirement**

9 After default, a secured creditor that seeks to sell the collateral must send the debtor and
10 any secondary obligor an authenticated notice of disposition of the collateral. RCW 62A.9A-
11 611(b)-(c). In the case of a private sale, like the sale that took place here, the authenticated
12 notice need only indicate that the secured party will sell the collateral sometime after a specified
13 date. Id. 62A.9A-613(5).

14 Defendants contend that Plaintiff failed to comply with the UCC's notice requirements
15 regarding the disposition of the Vessel, and therefore, they are entitled to the rebuttable
16 presumption that the value of the Vessel is equal to the underlying debt. Dkt. # 61 at 15-18. In
17 response, Plaintiff argues that it satisfied the notice requirements for a private disposition by
18 informing Plaintiff that it had appointed a selling agent for the Vessel and was working with a
19 broker to market the Vessel. Id. This information, Plaintiff argues, implied that the sales
20 process had begun and the Vessel would be sold in a private sale some time after the dates of
21 those communications. Id.

22 Contrary to Plaintiff's position, such vague references to preparations for sale do not
23 satisfy the notice requirement of RCW 62A.9A-611. Commercial Credit Corp. v. Wollgast, 11
24 Wn. App. 117, 122 (1974). Plaintiff's notice that it was working with a broker to market the
25 Vessel was insufficient to alert Ms. Nettleship to the chosen method of disposition or the date
26 and time the disposition was to be made. See Dkt. # 31 at 24. Even though the notice of a
27

1 private disposition must only inform the debtor of the date after which the sale will take place,
2 Plaintiff's communications still failed to provide any information from which Ms. Nettleship
3 could infer the date after which the private sale was to be made. Id. At best, the Bank's
4 communications informed Ms. Nettleship that Plaintiff was in the process of readying the Vessel
5 for sale, not that it had already listed the Vessel. Unlike the circumstances presented in
6 Brunswick Acceptance Co., LLC v. MEJ, LLC, 292 S.W.3d 638 (Tenn. Ct. App. 2008), on
7 which Plaintiff relies, Ms. Nettleship received no notice of the listing price of the Vessel, or
8 offers to purchase the Vessel. Moreover, the sale in this case took place less than two weeks
9 after Plaintiff informed Ms. Nettleship that it was working with an agent in New Zealand to sell
10 the boat. See Dkt. # 75-1 at 19; Dkt. # 37 at 4. This short time cannot compare to the four
11 months the debtor in Brunswick Acceptance Co. had to seek alternative buyers for the
12 surrendered collateral. See 292 S.W.3d at 644.

13 Plaintiff's alternative argument, that Ms. Nettleship waived her right to notice of the
14 disposition by executing the Bill of Sale is similarly unpersuasive. While it is true that voluntary
15 relinquishment of collateral may, in certain cases, operate as a waiver of notice of disposition
16 under RCW 62A.9A-624, Wollgast, 11 Wn. App. at 123, the circumstances presented here do
17 not support such a finding. Unlike the debtor in Wollgast, Ms. Nettleship continued to express
18 interest in the final disposition of the Vessel even after voluntarily relinquishing possession and
19 title of the Vessel, dkt. # 64 at 24, and there is no indication that she did not intend to find
20 alternative buyers for the Vessel. Furthermore, the UCC makes clear that waiver of the notice
21 provision must be made in writing after default. RCW 62A.9A-624(a). Despite Plaintiff's
22 argument to the contrary, nothing in the Bill of Sale suggests that Ms. Nettleship waived her
23 right to notice of the disposition of the Vessel. See Dkt. # 31 at 26-27. Based on the undisputed
24 facts in the record, the Court finds that Defendants did not waive their right to notice of the sale
25 of the Vessel and Plaintiff did not comply with the UCC's notice requirement.

1 **b. Commercially Reasonable Sale**

2 Defendants also claim that the sale of the Vessel was not commercially reasonable under
3 the UCC. Dkt. # 61 at 19-23. After a default, a secured party may sell, lease, license, or
4 otherwise dispose of the collateral, but it must do so in a commercially reasonable manner.
5 RCW 62A.9A-610(a)-(b). “Every aspect of a disposition of collateral, including the method,
6 manner, time, place, and other terms, must be commercially reasonable.” Id. 62A.9A-610(b).
7 The creditor must use its “best efforts to sell the collateral for the highest prices and to have a
8 reasonable regard for the debtor’s interests.” Swanson v. May, 40 Wn. App. 148, 155 (1985)
9 (quoting Foster v. Knutson, 84 Wn.2d 538, 549 (1974)). Here, Defendants contend that the sale
10 was not commercially reasonable because the listed price of the Vessel was too low and the
11 Vessel was under-marketed. Dkt. # 61 at 19.

12 The burden of proving commercial reasonableness is on the Bank. Security State Bank v.
13 Burk, 100 Wn. App. 94, 101 (2000). Generally, the fact that a greater sale price could have been
14 achieved by a disposition at a different time or in a different manner from that chosen by the
15 secured party is not by itself sufficient to establish that the disposition was not commercially
16 reasonable. RCW 62A.9A-610(a). However, “a low price suggests that a court should
17 scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially
18 reasonable.” Id. 62A.9A-610, UCC cmt. 2. “Commercial reasonableness of a sale depends on
19 the procedures employed in the sale, not on the proceeds it generates.” Leasing Serv. Corp. v.
20 Diamond Timber, Inc., 559 F.Supp. 972, 979 (S.D.N.Y 1983) (applying Washington law).
21 While RCW 62A.9A-627(b) sets forth the means for disposition that are commercially
22 reasonable, none of the specific methods of disposition identified in that section is required for a
23 sale to be commercially reasonable. RCW 62A.9A-627, UCC cmt. 3.

24 The Court finds that Plaintiff has met its burden and presented evidence sufficient to raise
25 genuine issues of material fact regarding whether the sale was commercially reasonable. The
26 Bank hired an experienced yacht broker to market and list the Vessel. Dkt. # 30 at 4; Dkt. #76-1
27

1 at 2. The broker set the listing price for the Vessel based on personal inspection of the Vessel,
2 the amount for which other similar vessels had recently sold, the economic climate in New
3 Zealand at the time, and the Vessel's damaged hull at the time of repossession and sale. Dkt. #
4 30 at 4-6; Dkt. # 76-1 at 5; Dkt. # 79-1 at 33. Based on the record, the Court finds the existence
5 of genuine material facts precluding summary judgment on the issue of whether the sale was
6 commercially reasonable.

7 Similarly, Plaintiff has presented evidence that the broker's marketing and sales efforts
8 were not unreasonable, particularly here, where the purchaser of the Vessel was not related to
9 the Bank or the broker. The broker listed the Vessel on five websites, including yacht sales
10 websites and the broker's own website, and contacted potential buyers who had expressed
11 interest in purchasing similar vessels in the past. Dkt. # 79-1 at 31-32. The broker also
12 displayed pictures of the Vessel in its showroom. Id. at 32. While it may have been alarming to
13 Defendants, as well as Plaintiff, that the broker received an offer for the Vessel within a week of
14 listing it, that fact alone is insufficient to establish that the sale was not commercially reasonable.

15 The valuations provided by Defendants do not undermine the Court's finding. The 2006
16 and 2007 valuations were completed several years and many miles before the Vessel was
17 repossessed by the Bank. Id. at 20. In addition, these appraisals and the February 2012
18 appraisal were performed to obtain insurance, not to determine the fair market value of the
19 Vessel for sale. Id. at 18-19, 24, 27. Similarly, the informal bank evaluations of the Vessel were
20 based on information from 2006 and therefore, may not necessarily reflect the value of the
21 Vessel at the time it was repossessed in 2012. Id. at 2-3, 7. While the Court is somewhat
22 troubled by the fact that there was no formal appraisal conducted before the sale, the Court finds
23 that Plaintiff has produced sufficient evidence to create a genuine issue of material fact regarding
24 whether the sale of the Vessel was commercially reasonable.

25 **c. Rebuttable Presumption of Value of Collateral**

26 Because Plaintiff failed to comply with the notice requirements of the UCC, it "faces a
27

1 rebuttable presumption that the value of the collateral is at least equal to the amount of the
2 outstanding debt.” McChord Credit Union v. Parrish, 61 Wn. App. 8, 14 (1991). To overcome
3 this presumption, “the creditor must either obtain a fair and reasonable appraisal at or near the
4 time of repossession or produce convincing evidence of the value of the collateral.” Id.
5 Convincing evidence of the value consists of “proof of the condition of the collateral and the
6 usual price of items of like condition.” Id. This evidence must “pinpoint” the value of the
7 Vessel on the date of repossession.” Id.

8 There is no dispute that the Bank did not obtain a fair and reasonable appraisal at or near
9 the time that it repossessed the Vessel. Dkt. # 62 at 27-28. Instead, Plaintiff’s sole evidence of
10 the value of the Vessel is the sale price of the Vessel, as determined by the broker. Dkt. # 78 at
11 19-20. Although evidence of the broker’s valuation of the Vessel and the broker’s sale process
12 are sufficient to raise a genuine issue of material fact regarding the commercial reasonableness
13 of the sale, the sale price alone is insufficient as a matter of law to rebut the presumption
14 following a violation of the UCC. See McChord, 61 Wn. App. at 15. “The primary focus of
15 commercial reasonableness is not the proceeds received from the sale but rather the procedures
16 employed for the sale.” Mount Vernon Dodge, Inc. v. Seattle-First Nat. Bank, 18 Wn. App. 569,
17 585 (1977) (quotations and alterations omitted). However, when determining whether a party
18 has rebutted the presumption that the value of the collateral is the amount of the outstanding
19 debt, the Court’s focus is on the fair and reasonable value of the collateral at the time of
20 repossession, not on the sale process.

21 As explained in McChord, the actual sale price of the Vessel is not “convincing evidence
22 of the [Vessel’s] value because the [broker’s report] does not sufficiently ‘pinpoint’ a [] value at
23 the time of repossession.” McChord, 61 Wn. App. at 15. The broker’s estimate of fair market
24 value was determined at the time it was listed for sale, not at the time of repossession. Dkt. # 30
25 at 4. Furthermore, the broker’s sale price was not based on any independent resources. Thus, it
26 does not compare to the secured party’s reliance on the N.A.D.A. “Blue Book” figure in
27

1 McChord. McChord, 61 Wn. App. at 15 (finding the N.A.D.A. Blue Book figure convincing
2 evidence of a car's fair and reasonable value). Because Plaintiff has not presented any other
3 evidence of the fair and reasonable value of the Vessel at the time it was repossessed in April
4 2012, the Court finds that it has failed to meet its burden to rebut the presumption that the value
5 of the Vessel was that of the underlying debt. Plaintiff is therefore precluded from seeking a
6 deficiency and the Court GRANTS Defendants' motion for summary judgment on Plaintiff's
7 deficiency claim.

8 **B. Defendants' Counterclaims**

9 **1. Violation of the SMA and JSA**

10 As explained in greater detail above, Plaintiff was not required to comply with the strict
11 notice, hearing, and appraisal requirements of the JSA. The 1996 amendment to the SMA made
12 clear that in the event of a default, lenders were not required to pursue a foreclosure action in
13 court and could take possession of a vessel instead. 46 U.S.C. § 31325(b)(3). Because the SMA
14 allows lenders to pursue self-help remedies, see Barclays Bank PLC, 710 F.3d at 20 n.4, and this
15 case does not involve the judicial remedy provided for by the SMA, Plaintiff was not required to
16 comply with the notice, hearing, and appraisal requirements of the JSA. Dietrich, 72 F.3d at
17 1517. The Court, therefore, GRANTS Plaintiff's motion for summary judgment on Defendants'
18 first counterclaim.

19 **2. Violation of the UCC - RCW 62A.9A-610, 611, 613**

20 The Bank seeks summary dismissal of Defendants' counterclaim alleging that the Bank
21 failed to comply with the UCC's notice requirements before selling the Vessel in June 2012.
22 Dkt. # 73 at 11-12. As explained above, Plaintiff did not provide sufficient notice of the sale to
23 Ms. Nettleship. The Court, therefore, DENIES Plaintiff's motion for summary dismissal of
24 Defendants' counterclaim.

25 **3. Setoff/Recoupment based on RCW 62A.9A-610**

26 Plaintiff requests dismissal of Defendants' counterclaim for a setoff/recoupment of the
27

1 true value of the Vessel against the deficiency and asks the Court to enter an order stating that
2 the sale price of the Vessel is the amount of the setoff to be applied to the underlying debt. Dkt.
3 # 73 at 12. Plaintiff first contends that Defendants are not entitled to any kind of a setoff or
4 recoupment because the UCC does not apply. Id. Contrary to Plaintiff's contention, the UCC
5 applies to this case and thus, Plaintiff is not entitled to summary dismissal of this counterclaim
6 on that ground.

7 As explained above, genuine issues of material fact remain regarding whether the sale of
8 the Vessel was commercially reasonable. However, because the Court finds that Plaintiff is
9 precluded from seeking any deficiency due to its failure to provide adequate notice under the
10 UCC, the Court GRANTS Plaintiff's motion for summary dismissal of Defendants' third
11 counterclaim.

12 **4. Washington Consumer Protection Act**

13 Washington's Consumer Protection Act ("CPA") prohibits "[u]nfair methods of
14 competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."
15 RCW 19.86.020. A private cause of action exists under the CPA if (1) the conduct is unfair or
16 deceptive, (2) occurs in trade or commerce, (3) affects the public interest, and (4) causes injury
17 (5) to plaintiff's business or property. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins.
18 Co., 105 Wn.2d 778, 780 (1986). Plaintiff argues that Defendants cannot establish the first or
19 third elements of their CPA counterclaim.

20 The CPA does not define "unfair or deceptive." Whether an act is unfair or deceptive is
21 determined by the courts as a question of law. Leingang v. Pierce County Med. Bureau, Inc.,
22 131 Wn.2d 133, 150 (1997). Washington courts have held that a deceptive act has the capacity
23 to deceive a substantial portion of the population (Sing v. John L. Scott, Inc., 134 Wn.2d 24, 30
24 (1997)) and "misleads or misrepresents something of material importance" (Holiday Resort
25 Cmty. Ass'n v. Echo Lake Assocs., LLC, 134 Wn. App. 210, 226 (2006)). This element focuses
26 on the act's capacity to deceive rather than its actual impact on the public, and is therefore
27

1 distinct from the third element of public interest impact. May v. Honeywell Int'l, Inc., 331 Fed.
2 Appx. 526, 529 (9th Cir. 2009). Defendants' CPA claim is based on the Bank's negotiations
3 regarding settlement of the New Zealand litigation against the Vessel and Ms. Nettleship. Dkt.
4 # 87 at 11. While Defendants argue that the Bank's negotiation of the Bill of Sale in exchange
5 for prompt retrieval of personal property of the Vessel was "unfair or deceptive," the Court finds
6 that this conduct is not likely to deceive a substantial portion of the population. Although
7 stressful, the negotiations regarding the resolution of the New Zealand litigation were conducted
8 through counsel and were not inherently, unfair or deceptive. Defendants, therefore, have not
9 satisfied the first element of a CPA claim.

10 Furthermore, Defendants have not produced evidence from which a reasonable factfinder
11 could conclude that the Bank's conduct had the potential to affect large numbers of consumers
12 and therefore affects the public interest. Stephens v. Omni Ins. Co., 138 Wn. App. 151, 178
13 (2007). When, such as the case is here, the complaint involves a private dispute, the Court
14 evaluates four factors to determine whether the Bank's conduct affects the public interest.
15 Michael v. Mosquera-Lacy, 165 Wn.2d 595, 605 (2009). None of the factors is dispositive and
16 not all four must be present. The factors are: (1) whether the alleged acts were committed in the
17 course of the Bank's business; (2) whether the Bank advertized to the public in general; (3)
18 whether the Bank actively solicited Defendants; and (4) whether the parties have unequal
19 bargaining positions. Id. Here, the Bank was undoubtedly acting within the scope of its
20 business. The Bank offers banking and loan services to the general public and it was providing
21 those services to Defendants when Defendants' claim arose. However, there is no evidence that
22 the Bank advertized to the public or solicited Defendants' business in particular. Defendants
23 were free to select any Bank or loan servicing program they desired. Considering the relevant
24 factors, the Court finds there is no real or substantial likelihood that large numbers of consumers
25 would be injured in the same manner alleged by Defendants due to the Bank's particular
26 negotiating conduct in this case. Defendants have failed to raise a genuine issue of fact
27

1 regarding other similar solicitations or a pattern of unfair practices that could satisfy the public
2 interest element of the CPA. Plaintiff's claim for summary dismissal of Defendants' CPA
3 counterclaim is GRANTED.

4 **5. Conversion of the Vessel**

5 "[C]onversion is the act of willfully interfering with any chattel, without lawful
6 justification, whereby any person entitled thereto is deprived of the possession of it." Consulting
7 Overseas Mgmt., Ltd. v. Shtikel, 105 Wn. App. 80, 83 (2001) (internal quotation marks and
8 citation omitted). Defendants and Plaintiff seek summary judgment on Defendants'
9 counterclaim that Plaintiff's repossession of the Vessel constituted conversion. Dkt. # 73.

10 As set forth in the Mortgage, in the case of default "the [Bank] is hereby authorized to
11 take possession of said goods, chattels, and personal property at any time, wherever found."
12 Dkt. # 27-1 at 16. It is undisputed that Defendants defaulted on the obligations under the Note
13 by failing to make payments. Dkt. # 74-1 at 5. Thus, pursuant to the parties' agreement, the
14 Bank had the right to repossess the Vessel in New Zealand and this repossession does not
15 constitute conversion. To the extent that Defendants claim that the Bank's repossession was not
16 lawful because it did not comply with the governing law and choice of venue clauses in the Note
17 and Guaranty, or the notice requirement in the Mortgage, the claim is duplicative of their
18 counterclaims for breach of contract. See Dkt. # 87 at 13.

19 As for Defendants' claim that Plaintiff's sale of the Vessel constituted conversion, the
20 Court agrees with Plaintiff that Defendants voluntarily relinquished ownership of the Vessel by
21 executing the Bill of Sale. Although Defendants argue that Ms. Nettleship was forced to sign the
22 Bill of Sale under duress, dkt. # 87 at 14, Defendants have not produced sufficient evidence to
23 support this claim. To establish duress or coercion, Defendants must prove "more than
24 reluctance to accept or financial embarrassment. The assertion of duress must be proven by
25 evidence that the duress resulted from the other's wrongful or oppressive conduct." Retail
26 Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc., 96 Wn.2d 939, 944

1 (1982). “Generally, circumstances must demonstrate a person was deprived of his free will at
2 the time he entered into the challenged agreement in order to sustain a claim of duress.” Id. at
3 944-45.

4 Here, Ms. Nettleship was represented by counsel during negotiations regarding the Bill of
5 Sale and as a result of these negotiations, she was able to remove personal items from the Vessel
6 quickly. Dkt. # 75-1 at 4-10, 15-17. Having your property foreclosed upon while facing the
7 expiration of a travel visa in a foreign country is undoubtedly stressful, but not wrongful or
8 unlawful, particularly where the person whose property is being foreclosed upon has defaulted
9 on a loan secured by the property. Under these circumstances, the Court cannot conclude that
10 Ms. Nettleship was deprived of her free will when she signed the Bill of Sale. Thus, the sale of
11 the Vessel did not constitute conversion and Plaintiff is entitled to summary judgment on this
12 claim.⁷

13 **6. Conversion of Personal Property**

14 In Defendants’ sixth counterclaim, they allege that Plaintiff’s retention of personal
15 property present on the Vessel at the time of repossession in New Zealand constitutes
16 conversion. Dkt. # 18 ¶¶ 73-76. Defendants and Plaintiff have cross-moved for summary
17 judgment on this counterclaim. Dkt. # 65; Dkt. # 73. The parties dispute whether the items at
18 issue were covered by the parties’ agreement regarding the loan and whether Ms. Nettleship has
19 standing to bring this counterclaim because most of the property is Mr. Bell’s separate property.
20 Dkt. # 65 at 4-13; Dkt. # 73 at 17-22.

21 The Court first considers Plaintiff’s argument that Ms. Nettleship lacks standing. In
22 federal court, a plaintiff must have standing before the Court may grant any relief. City of L.A.
23 v. Lyons, 461 U.S. 95, 101 (1983). Standing is “an essential and unchanging part of the case-or-
24 controversy requirement of Article III.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 560

25
26 ⁷ Because the Court’s decision is not based on the interpretation or application of foreign law,
27 the Court DENIES Defendants’ motion to strike (Dkt. # 87).

1 (1992). The primary issue is whether “a party has a sufficient stake in an otherwise justiciable
2 controversy to obtain judicial resolution of that controversy.” Dream Palace v. Cnty. of
3 Maricopa, 384 F.3d 990, 999 (9th Cir. 2004) (quoting Sierra Club v. Morton, 405 U.S. 727, 731
4 (1972)).

5 Standing to bring a claim before this Court consists of three elements: (1) an “injury in
6 fact” comprised of a “concrete and particularized” invasion of a legally-protected interest; (2) a
7 causal connection between the conduct complained of and the injury; and (3) a likelihood that
8 the injury will be “redressed by a favorable decision.” Lujan, 504 U.S. at 560-61. Defendants
9 argue that some of the personal property at the heart of Defendants’ conversion claim is Mr.
10 Bell’s separate property, and therefore, Ms. Nettleship lacks standing to pursue a claim of
11 conversion related to that property. Even if Plaintiff is correct that some of the property is Mr.
12 Bell’s separate property, Ms. Nettleship has standing to assert the injury in fact suffered by Mr.
13 Bell because he assigned his claims related to the property to Ms. Nettleship, dkt. # 74-2 at 89,
14 and Plaintiff has not produced evidence that calls into doubt the validity of that assignment. Vt.
15 Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 773 (200) (“the assignee
16 of a claim has standing to assert the injury in fact suffered by the assignor.”).

17 Having determined that Ms. Nettleship has standing to pursue this conversion claim, the
18 Court turns to whether the parties intended the Mortgage to cover the property identified by Ms.
19 Nettleship, including spare parts, tools, cooking and baking supplies, bedding, towels,
20 navigational books and charts, maps and tour guides, cruising guides and operation manuals, and
21 recreational equipment. Dkt. # 66 at 6-25. Under Washington law, “the intent of the parties to a
22 particular agreement may be discovered not only from the actual language of the agreement but
23 also from viewing the contract as a whole, the subject matter and objective of the contract, all
24 the circumstances surrounding the making of the contract, the subsequent acts and conduct of the
25 parties to the contract, and the reasonableness of respective interpretations advocated by the
26 parties.” Tanner Elec. Co-op. v. Puget Sound Power & Light Co., 128 Wn.2d 656, 674 (1996).

1 Thus, as an initial matter, the Court has considered the language of the Note and the Mortgage to
2 determine the intent of the parties, as both were made and executed at the same time and
3 complement each other. See Wash. Fed. Sav. & Loan Ass'n v. Alsager, 165 Wn. App. 10, 14
4 (2011) (considering promissory note and deed of trust as stating terms of conditions of
5 obligation); Kathman v. Wakeling, 69 Wn.2d 195, 200 (1966); see also Hearst Commc'ns, Inc.
6 v. Seattle Times, Co., 154 Wn.2d 493, 503 (2005) (“surrounding circumstances and other
7 extrinsic evidence are to be used to determine the meaning of specific words and terms used and
8 not to show an intention independent of the instrument or to vary, contradict or modify the
9 written word.”) (internal quotation marks and citations omitted).

10 The primary goal of contract interpretation is “to carry out the intent of the parties as
11 manifested, if possible, by the parties’ own contract language.” Dep’t of Corr. v. Fluor Daniel,
12 Inc., 160 Wn.2d 786, 795 (2007) (en banc). Washington follows the objective theory of
13 contract, under which the court attempts to determine the parties’ intent by examining the
14 objective manifestations of the agreement, rather than focusing on the parties’ unexpressed
15 subjective intents. Hearst Commc'ns, Inc., 154 Wn.2d at 503-04. Contract interpretation is a
16 question of law if it is unnecessary to rely on extrinsic evidence or if only one reasonable
17 inference can be drawn from the extrinsic evidence. Tanner, 128 Wn.2d at 674. When the
18 parties’ intentions must be determined from extrinsic evidence, however, it is the trier of fact’s
19 role to evaluate the credibility of the evidence and choose among varying inferences that can be
20 drawn from the evidence. Berg v. Hudesman, 115 Wn.2d 657, 668 (1990).

21 The heart of the parties’ dispute is whether they intended “the whole of the Vessel,
22 together with all of the mast, bowsprit, boat, anchors, cables, chains, rigging, tackle, apparel,
23 furniture, and all other necessities thereunto appertaining and belonging,” to include the
24 property described above. Dkt. # 73 at 17-21; Dkt. #65 at 5-8. In arguing that the parties did not
25 intend the Mortgage to cover these items, Plaintiff relies on her deposition testimony and the
26 testimony of Charles Guildner, an Executive Vice President and Chief Credit Officer for the
27

1 Bank. Dkt. # 65 at 7. The Bank also relies on extrinsic evidence to support its position that the
2 parties intended the Mortgage to cover a broad array of property that may be on the Vessel. Dkt.
3 # 73 at 19.

4 Because there is more than one reasonable inference that can be drawn from the evidence
5 submitted, the Court finds that questions of material fact exist regarding whether the parties
6 intended the Mortgage to cover the property that is the subject of this conversion counterclaim.
7 Thus, the Court cannot determine whether the Bank unlawfully interfered with the property. The
8 parties' cross-motions for summary judgment on Defendants' sixth counterclaim is DENIED.

9 **7. Breach of Contract (the Note)**

10 The parties have cross-moved for summary judgment on Defendants' seventh
11 counterclaim, breach of the promissory note. Dkt. # 27 at 19-20; Dkt. # 73 at 22. To succeed on
12 a breach of contract claim, a part must show that a contract created a duty, the duty was
13 breached, and the breach proximately caused damage to the party. Nw. Indep. Forest Mfrs. v.
14 Dep't of Labor & Indus., 78 Wn. App. 707, 712 (1995).

15 Defendants contend that Plaintiff breached the Note by failing to provide notice of the
16 default and an opportunity to cure. Dkt. # 18 ¶¶ 77-80. In response to Plaintiff's motion for
17 partial summary judgment, however, Defendants admit that the terms of the Note do not require
18 Plaintiff to provide notice and an opportunity to cure in the case of a default in payment, dkt. #
19 87 at 18, and thus, the Court DENIES Defendants' motion for summary judgment and GRANTS
20 Plaintiff's motion for summary judgment on this claim.

21 **8. Breach of Contract (the Mortgage)**

22 It is undisputed that in the case of default, before Plaintiff could sell or convey the Vessel,
23 the Mortgage required Plaintiff to provide "a notice of a legal number of days. . . by publication
24 in some newspaper published in the city where Mortgagor resides or conducts business." Dkt. #
25 27 at 19; Dkt. # 29 at 16. Plaintiff does not dispute that it did not publish a notice of sale in a
26 newspaper in Seattle before selling the Vessel in New Zealand. Dkt. # 29 at 16; Dkt. # 73 at 22-

1 24.

2 Defendants therefore, have established a breach of contract with regards to the notice
3 requirement in the Mortgage. In order to recover on a breach of contract claim, however,
4 Defendants bear the burden of proving that they “incurred actual economic damages as a result
5 of the breach.” Columbia Park Golf Course, Inc. v. City of Kennewick, 160 Wn. App. 66, 83
6 (2011). “Evidence of damage is sufficient if it affords a reasonable basis for estimating the loss
7 and does not subject the trier of fact to mere speculation or conjecture.” Shinn v. Thrust IV,
8 Inc., 56 Wn. App. 827, 840 (1990).

9 To show damage, Defendants argue that if they had received notice of the sale of the
10 Vessel, they would have been able to secure another buyer who would have paid more than the
11 amount actually received on the sale of the Vessel. Dkt. # 87 at 18-21. They rely on evidence
12 that Ms. Nettleship and Mr. Bell were aware of people who had, at one time, expressed interest
13 in purchasing the Vessel or a yacht similar to it. Id.⁸ This evidence, however, is too speculative
14 to show the existence of damages. Furthermore, Defendants have not shown that it was the lack
15 of notice in a newspaper in Seattle that prohibited them from securing a buyer who would have
16 paid more for the Vessel. At best, the evidence presented suggests that Mr. Bell was aware of
17 other people who, at one time or another, expressed interest in owning the Vessel. Because
18 Defendants have failed to produce any evidence of economic injury associated with this breach,
19 Plaintiff is entitled to summary judgment on this counterclaim and Defendants’ motion for
20 summary judgment is DENIED.

21 **9. Breach of Contract (the Note and Guaranty)**

22 Both parties seek summary judgment on Defendants’ counterclaim that Plaintiff breached
23

24
25 ⁸ Plaintiff moves to strike Mr. Bell’s deposition testimony regarding statements by other people
26 that they were interested in purchasing the Vessel because it is hearsay. Dkt. # 89 at 13. The Court
27 agrees with Plaintiff and has not considered the statements for the truth of the matter asserted. The
Court DENIES “Defendants’ Motion for As-needed Briefing in Response to Plaintiff’s Motion to
Strike” (Dkt. # 91).

1 the terms of the Note and Guaranty by repossessing the Vessel in New Zealand pursuant to New
2 Zealand laws. Dkt. # 27 at 19-20; Dkt. # 73 at 24. Although Defendants' counterclaim
3 identifies the governing law provisions of the Note and Guaranty, dkt. # 18 ¶¶ 85-89, Defendants
4 also argue in response to Plaintiff's motion for partial summary judgment that this counterclaim
5 is based on the language in the "Choice of Venue" clause in the Note and Guaranty, which
6 provides that "[i]f there is a lawsuit, [Bluewater and Ms. Nettleship] agree[] upon Lender's
7 request to submit to the jurisdiction of the courts of King County, State of Washington." Dkt. #
8 27-1 at 10 (Note), 13 (Guaranty).

9 First, to the extent that Defendants rely on the governing law provisions of the Note and
10 Guaranty, Plaintiff is entitled to summary judgment because these provisions do not impose any
11 duties on Plaintiff or confer any rights on Defendants. Nw. Indep. Forest Mfrs., 78 Wn. App. at
12 712 (setting forth elements of breach of contract claim). Second, to the extent that Defendants
13 rely on the choice of venue clause, the Court finds that this clause is not a mandatory forum
14 selection clause. Rather, the language in this clause merely provides consent to jurisdiction in
15 Washington courts should litigation occur. Chew v. Lord, 143 Wn. App. 807, 817-18
16 (distinguishing between forum selection clause and consent to personal jurisdiction).
17 "Consenting to personal jurisdiction in Washington courts is not the same as agreeing that
18 Washington courts are the only venue in which a claim may be brought." Id. at 818. The
19 language in the Note and Guaranty merely indicate that if suit is filed, Ms. Nettleship and
20 Bluewater consent to personal jurisdiction in Washington, upon Plaintiff's request. Dkt. # 27-1
21 at 10, 13. These provisions do not provide that Washington courts are the only forum in which
22 an action could be brought. The Court, therefore, DENIES Defendants' motion for summary
23 judgment on this claim and GRANTS Plaintiff's motion for summary dismissal.

24 **10. Unjust Enrichment/Quasi-Contract**

25 In their tenth counterclaim, Defendants seek relief based on a theory of unjust
26 enrichment/quasi-contract. Dkt. # 18 ¶¶ 90-95. Under Washington law, however, "a plaintiff
27

1 who is a party to a ‘valid express contract is bound by the provisions of that contract’ and may
2 not bring a claim for unjust enrichment for issues arising under the contract’s subject matter.”
3 Minnick v. Clearwire US, LLC, 683 F.Supp.2d 1179, 1186 (W.D. Wash. 2010) (quoting
4 Chandler v. Wash. Toll Bridge Auth., 17 Wn.2d 591, 604 (1943)); see also Westcott v. Wells
5 Fargo Bank, N.A., 862 F.Supp.2d 1111, 1116 (W.D. Wash. 2012) (“a party cannot bring an
6 action for implied contract or quasi-contract where a valid written agreement covers the parties’
7 dispute.”). Because it is undisputed that Defendants are parties to an agreement governing the
8 subject matter of this dispute, dkt. # 73 at 25; dkt. # 87 at 22, the Court DENIES Defendants’
9 motion for summary judgment on this claim and GRANTS Plaintiff’s motion for summary
10 judgment.

11 **11. Breach of Implied Duty of Good Faith and Fair Dealing**

12 Finally, Plaintiff seeks summary dismissal of Defendants’ eleventh counterclaim in which
13 they allege that Plaintiff breached its duty of good faith and fair dealing. Dkt. # 73 at 25.
14 “There is in every contract an implied duty of good faith and fair dealing. . . that obligates the
15 parties to cooperate with each other so that each may obtain the full benefit of performance.”
16 Badgett v. Sec. State Bank, 116 Wn.2d 563, 569 (1991). This duty, however, does not “inject
17 substantive terms into the parties’ contract,” but rather, “requires only that the parties perform in
18 good faith the obligations imposed by their agreement.” Id. (quotation marks and citation
19 omitted). Accordingly, the duty is not “free-floating,” but “exists only in relation to
20 performance of a specific contract term.” Id. at 570.

21 Defendants claim that Plaintiff’s duty of good faith and fair dealing obligated it to comply
22 with the governing law provisions of the Note and Guaranty, to provide notice of the sale
23 pursuant to the terms in the Mortgage, and to conduct a sale of the Vessel in a manner that would
24 return a surplus to Defendants. Dkt. # 18 ¶ 98-100. To the extent that Defendants’ counterclaim
25 is based on the governing law provisions of the Note and the Guaranty, as explained above, these
26 provisions do not impose any obligations on Plaintiff and therefore, Defendants’ claim on this
27

1 basis fails as a matter of law. Johnson v. Yousoofian, 84 Wn. App. 755, 762 (1996) (“If there is
2 no contractual duty, there is nothing that must be performed in good faith.”). Plaintiff also has
3 not identified any provision in the Note, Mortgage, or Guaranty that obligates the Plaintiff,
4 following default, to dispose of the Vessel in a manner that would return a surplus to
5 Defendants. The Mortgage provides that if, and only if the disposition of the Vessel results in a
6 surplus, that surplus must be returned to Bluewater. Dkt. # 27-1 at 16. Because Defendants
7 have not identified any contract provision requiring Plaintiff to dispose of the Vessel in a manner
8 that would return a surplus, Plaintiff’s counterclaim based on Defendants’ alleged failure to
9 pursue a sale that would return a surplus cannot survive summary judgment. See Badgett, 116
10 Wn.2d at 570.

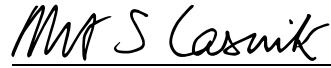
11 As for Plaintiff’s failure to provide notice pursuant to the terms of the Mortgage, the
12 Court finds that Defendants have not produced any evidence to create a genuine issue of material
13 fact to overcome summary judgment. While there is no dispute that Plaintiff did not provide the
14 requisite notice, there is nothing in the record that suggests that Defendants’ failure occurred in
15 bad faith, particularly in light of Defendants’ receipt of the executed Bill of Sale from Ms.
16 Nettleship. In the absence of any genuine issue of material fact, Plaintiff is entitled to summary
17 dismissal of Defendants’ counterclaim for breach of the duty of good faith and fair dealing.

18 **IV. CONCLUSION**

19 For all of the foregoing reasons, the Court GRANTS IN PART and DENIES IN PART
20 the parties’ cross-motions for summary judgment (Dkt. # 27, 61, 65, 73). Defendants’ motions
21 for partial summary judgment are GRANTED with respect to Plaintiff’s deficiency claim and
22 DENIED with respect to Defendants’ counterclaims 5 and 7-10. Plaintiff’s motion for partial
23 summary judgment is GRANTED with respect to Defendants’ counterclaims 1-5 and 7-11. The
24 parties’ cross-motions for summary judgment on Defendants’ sixth counterclaim is DENIED.
25 Defendants’ “Motion for As-needed Briefing in Response to Plaintiff’s Motion to Strike” (Dkt. #
26 91) is DENIED. Defendants’ sixth counterclaim for conversion of property on board the Vessel
27

1 remains for trial.

2 DATED this 17th day of January, 2014.

3
4 

5 Robert S. Lasnik

6 United States District Judge
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27